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International Convention for the Protection of All Persons from Enforced Disappearance

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Consideration of reports of States parties to the Convention

List of issues in relation to the report submitted by Austria under article 29 (1) of the Convention

Addendum

Replies of Austria to the list of issues*

[11 January 2018]

* The present document is being issued without formal editing.

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I. General information

Please provide information about the process of preparing the report, including consultations that might have taken place with different organs of the State party, civil society actors and other relevant stakeholders.

1. The report was mostly prepared by the Federal Ministry of Constitution, Reforms, Deregulation and Justice (hereinafter: Ministry of Justice) based on the "Travaux préparatoires" for the ratification of the Convention by Austria. The report was coordinated with all relevant Federal Ministries and circulated to all Human Rights coordinators of the Federal Ministries and the Austrian Regions.

Please provide information about the status of the Convention vis-à-vis national law and indicate whether its provisions can be directly invoked before and applied by courts or other relevant authorities.

2. According to the Explanatory Notes of the Convention, prepared for the parliamentary proceedings (1637 Supplement to the Stenographical Protocols of the Parliament, XXIVth legislation period, 3), the Convention has the status of a law and was ratified without any reservation. Insofar as its provisions are sufficiently precise, the Convention is thus directly applicable (self executing).

Please provide information on the activities carried out by the Austrian Ombudsman Board in relation to the Convention and any additional measures taken by the State party for the Ombudsman Board to be in full compliance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).

3. The Austrian Ombudsman Board (AOB) consists of three members who alternately chair the board. The three members are elected by the National Council (Parliament's first chamber) based on a recommendation by the three parties with the highest number of seats in the National Council. This appointment procedure ensures the required democratic legitimation, an essential characteristic of a parliamentary democracy. The members of the AOB are fully independent and cannot be suspended from their office, transferred or dismissed over their six-year term. The term of office can be extended once.

4. The AOB acts as the National Preventive Mechanism (NPM). In this capacity, its core responsibilities include protecting persons who have been deprived of their liberty against torture and inhuman treatment. The work of the Austrian NPM consists of recognising and reporting vulnerable situations as early as possible. This represents the essence of the preventive mandate: to monitor the human rights situation through regular, largely unannounced visits - even if no complaint or notice of an incident has been received. The aim is to help to avoid potential cases of maladministration before they arise, to determine human rights violations through visits across Austria and to show how the recurrence of past cases of maladministration can be avoided. As part of its mandate, the AOB considers it to be its responsibility to support people who are only able to exercise their rights to a limited extent. In its first five years of activities the NPM has conducted a total of more than 2,000 visits.

5. The AOB also visits and monitors institutions and programmes for people with disabilities with its commissions. The aim is to prevent any conceivable form of exploitation, violence and abuse. In this way, the AOB also implements regulations of the UN Convention on the Rights of Persons with Disabilities in Austria.

6. The AOB annually reports to the Parliament on its activities as NPM and publishes these reports. An English version of the 2016 report can be found here: volksanwaltschaft.gv.at/downloads/6cpkm/NPM%20Bericht%202016_EN_FINAL_2.pdf

II. Definition and criminalization of enforced disappearance (arts. 1–7)

With regards to paragraph 20 of the State party's report, please indicate whether there exists in national law an express prohibition on invoking a state of necessity or

any public emergency to justify any violation of, or restrictions on, human rights and freedoms. Please also indicate whether any legislation and/or practices concerning terrorism, national security or other grounds that the State party may have adopted have had any impact on the effective implementation of the Convention, in particular the prohibitions stemming from articles 1 and 16.

7. According to the Austrian Federal Constitution, emergency measures are allowed to a very limited extent only: The Federal President can, at the recommendation of the Federal Government, take the necessary measures by way of provisional law amending ordinances if they are necessary to prevent obvious and irreparable damage to the community at a time when the National Council is not assembled or cannot meet in time or is impeded from action by events beyond its control. The Government must present its recommendation with the consent of the standing sub-committee to be appointed by the Main Committee of the National Council.

8. Due to the interim nature of these Presidential ordinances they shall be transmitted by the Government to the National Council without delay. Then the members of Parliament have to decide within a narrow time frame whether to pass a corresponding federal law or a resolution demanding that the ordinance be abrogated immediately.

9. That way, there are various safeguards: The Federal President cannot act on his own, because it is the Government to initiate and countersign a measure of emergency. In addition, the Government has to seek the consent of an organ of the Parliament not only before preparing such a law amending ordinance but also afterwards. But first and foremost, the ordinances must not be in conflict with the Federal Constitution (cf Article 18 para. 3) and, accordingly, must not restrict or even suspend the human rights' guarantees enshrined therein.

10. There exists no express prohibition to invoke a state of necessity or any public emergency to justify any violation of or restrictions to human rights and freedom.

11. In the Austrian Criminal Code (CC) there are several prohibitions of different conduct, which potentially could invoke a state of necessity or a public emergency. For example, division 14 penalizes high treason and other offences against the State (Sect. 242-248 CC), division 15 criminalizes offences against senior government institutions (Sect. 249-251 CC). The crimes encompass:

- High treason (Sect. 242 CC);
- Preparation of high treason (Sect. 244 CC);
- Subversive associations (Sect. 246 CC);
- Vilification of the State and its insignia (Sect. 248 CC);
- Using force and making dangerous threats against the Federal President (Sect. 249 CC);
- Coercing a constitutional representative body, a Government, the Constitutional Court, Administrative Court or Supreme Court of Austria (Sect. 250 CC);
- Coercing a member of a constitutional representative body, a Government, the Constitutional Court, the Administrative Court, the Supreme Court of Austria, or the President of the Audit Office or a Director of a State Audit Office (Sect. 251 CC).

12. According to Art. 18 para. 1 of the Austrian Federal Constitution, the entire state administration may only be exercised based on the law.

Please explain how a political organization, as referred to in the current definition of enforced disappearances in section 312b of the Criminal Code, would satisfy the definition of persons or groups of persons acting with the authorization, support or acquiescence of the State, in accordance with article 2 of the Convention. Please (a) explain whether section 312b is compatible with article 2 of the Convention given the omission of the refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person and (b) clarify whether the State party's interpretation of section 312b is that placing a person outside the protection of the law is a consequence of the offence of enforced disappearance and not a constitutive element of it (art. 2).

13. Sect. 312b CC reads as follows:

> "Any person who kidnaps another or otherwise deprives another of his or her personal liberty on behalf or with the acquiescence of a State or a political organisation and conceals the fate or whereabouts of the missing person is liable to imprisonment for one to 10 years."

14. Being more general, the definition in Sect. 312b CC "any person" acting "on behalf or with the acquiescence of a State" covers all forms of "agents of the State or persons or groups of persons acting with the authorization, support or acquiescence of the State" as defined in Art. 2 of the Convention. The extension to "political organisation" in Sect. 312b CC was added with a view to Art. 3 of the Convention ("persons or groups of persons acting without the authorization, support or acquiescence of the State"). It makes the definition even broader by adding an alternative element ("a State or a political organisation") bearing in mind i.a. situations where there is no (legitimate) state authority such as coups d'état, rebel governments, secessionist governments etc.

15. According to the general provision Sect. 12 CC, the immediate perpetrator and any person directing another or contributing in any other way to the commission of an offence is taken to have committed that offence (thus covering any "support" and "groups of persons"):

(a) The definition in Sect. 312b CC includes the element of concealment of the fate or whereabouts of the missing person. The Austrian legislator refrained from explicitly mentioning "a refusal to acknowledge the deprivation of liberty" because of the reasons mentioned in the report. The way Sect. 312b CC is structured (any form of kidnaping or other deprivation of liberty together with the concealment of the fate or whereabouts of the missing person) emphasises the objective elements of the crime. It does not matter whether the perpetrator refuses to acknowledge the deprivation of liberty or not. Thus, the definition in Sect. 312b CC covers all forms of enforced disappearances defined in Art. 2 of the Convention.

(b) Yes, while placing the victim de facto (not de lege) outside the protection of the law is a typical consequence of enforced disappearance, it is not a constitutive element of the offence pursuant to Sect. 312b CC.

In relation to paragraphs 41 and 43 of the report, please explain what constitutes contributing to an offence of enforced disappearance, and how the acts of endorsement and psychological support are interpreted in relation to section 12 of the Criminal Code. In relation to paragraph 45 of the report, please provide examples, if available, of instances in which such provisions have been invoked and/or applied. Please also describe the legal recourse available to subordinates against any potential disciplinary measures resulting from their refusal to carry out a criminal act ordered by a superior, as mentioned in paragraph 45 of the report (art. 6).

16. Contribution according to Sect. 12 CC is interpreted very broadly by the Austrian courts and academia (cf. e.g. Austrian Supreme Court decision no. RS0089549). It encompasses all kinds of physical support (i.e. by doing something, e.g., providing the service of watching out if someone could come and intervene) or psychological support (e.g. advice, endorsement or encouragement).

17. There are no cases known in which subordinates were forced by (military) superiors to kidnap, abduct or forcefully make persons disappear against their will and hold them

captive somewhere. Therefore, the following statement must be general in nature and is limited to the possibility of taking legal remedies in disciplinary proceedings.

18. It should, however, be stressed at the outset that it is not conceivable that someone who does not follow such a clearly criminally illegal order would be prosecuted under disciplinary proceedings, especially since the exact opposite, namely the adherence to such an criminally illegal order, is subject to criminal responsibility as well as disciplinary sanctions. As in any other disciplinary proceedings under the "Heeresdisziplinargesetz (HDG) 2014" [Armed Forces Disciplinary Law 2014] for soldiers as well as the "Beamten-Dienstrechtsgesetz (BDG) 1979" [Civil Service Act 1979] for civil servants, the defendant can raise an objection against an disciplinary order and can lodge a complaint to the Federal Administrative Court against a disciplinary verdict.

Please explain how the current level of punishment in the Criminal Code is the appropriate penalty for an offence of enforced disappearance, taking into account its extreme seriousness. With reference to paragraphs 39 and 47 of the report, please clarify whether the penalty for the offence of enforced disappearance as a crime against humanity is life imprisonment in cases that result in the intentional, as opposed to the negligent, death of the disappeared person (art. 7).

19. The level of punishment for Sect. 312b CC (one to 10 years of imprisonment) is an appropriate penalty compared to other penalties provided for in the Criminal Code.

20. For comparison:

(a) The offense of "deprivation of liberty" according to Sect. 99 CC, i.e. any person who unlawfully detains another or deprives another of his or her personal liberty, is penalized with imprisonment for up to three years. If the person who deprives another person of his or her liberty for more than one month, or who deprives another of his or her liberty in a way that is particularly tormenting for the other person, or in circumstances involving particularly serious detriments for the other person, he/she is liable to imprisonment for one to 10 years;

(b) The offense of "tormenting or neglecting prisoners" according to Sect. 312 CC, i.e. any person being a government official who physically or mentally torments any prisoner or any person who is otherwise detained by official order and who has control over or official access to the prisoner or detainee, is penalized with imprisonment for up to two years. The same penalty applies to any government official who grossly violates his or her duty towards a prisoner or detainee under their care or in their custody thus causing, even if only negligently, significant damage to that person's health or physical or mental development. The person is liable to imprisonment for up to three years if the offence involves a serious assault; the person is liable to imprisonment for up to five years if the offence involves an assault occasioning grievous bodily harm; the person is liable to imprisonment for one to 10 years if the offence causes the death of the victim.

21. If the offense pursuant to Sect. 312b CC is committed by a government official who is abusing an opportunity provided to him or her in his or her official capacity, the maximum penalty may be exceeded by more than half pursuant to Sect. 313 CC, i.e. making up for a maximum penalty of 15 years.

22. The penalty for an offence of enforced disappearance as a crime against humanity is five to 15 years of imprisonment. The perpetrator is liable to imprisonment for 10 to 20 years or to imprisonment for life if the offence negligently causes the death of another (Sect. 321a para. 3 subpara. 5 CC).

23. Any person who as part of a widespread or systematic attack against any civilian population, i.e. as a crime against humanity, intentionally causes the death of another, i.e. kills another person, is liable to imprisonment for life (Sect. 321a para. 1 subpara. 1 CC). This includes the case that the perpetrator first enforces the disappearance of a person and then kills the victim (intentionally).

III. Judicial procedure and cooperation in criminal matters (arts. 8–15)

With reference to paragraph 51 of the report, please provide detailed information on the criteria and standards used to determine when the offence of enforced disappearance has ceased and thus the term of limitation may commence. Please explain how the current term of limitation is of long duration and is proportionate to the extreme seriousness of the offence as set out in article 8 (1) (a) of the Convention (art. 8).

24. According to Sect. 57 para. 1 CC, no statute of limitation applies to an offence of enforced disappearance as a crime against humanity.

25. According to Sect. 57 para. 2 CC, the time limitation commences with cessation of the criminalized conduct. The criminalized conduct of Sect. 312b CC is the deprivation of personal liberty and the concealment of the fate or whereabouts of the missing person. Thus, e.g., if the perpetrator informs the authorities of the whereabouts of the missing person, they find out otherwise, or the victim is set free or escapes, the criminalized conduct is ceased.

26. It is noteworthy that pursuant to Sect. 58 CC the statute of limitation is extended under certain circumstances. In particular, the statute of limitation is not affected by (Sect. 58 para. 3 CC):

(a) Any time period during which a prosecution may not be instigated or continued by law, unless the Federal Constitution or Sect. 58 para. 4 CC provide otherwise;

(b) Any time period between the first questioning of the person formally accused, the first [official] threat or use of force against the perpetrator in connection with the offence, the first order or application by the prosecution to execute or authorize investigative measures and evidentiary hearings under Part 8 of the Code of Criminal Procedure in relation to suspicions against the perpetrator, the order for search or arrest of the perpetrator, the application for a remand order, or the indictment and the completion of criminal proceedings with legal force;

(c) The time period until the victim of an offence against limb and life, liberty, or sexual integrity and self-determination reaches the age of 28, if the victim was a minor at the time the offence was committed;

(d) A probation period under Sect. 203 para. 1 of the Code of Criminal Procedure, the time period to pay the amount of money including any reparation of damages and to perform a charitable service including any conciliation of consequences of the offence (Sect. 200 para. 2 and 3, 201 para. 1 and 3 of the Code of Criminal Procedure, or by the time period between the lodgement of an application by the prosecution under Sect. 204 para. 3 of the Code of Criminal Procedure and the notification of the adjudicator about the settlement agreements and their fulfilment (Sect. 204 para. 4 of the Code of Criminal Procedure).

27. Moreover, if the person commits a further offence during the statute of limitation that is based on the same malicious propensity, the statutory limitation period does not expire any earlier than the point at which the limitation for the further offence lapses (Sect. 58 para. 2 CC).

28. Except for certain crimes (such as the crime against humanity) to which no statute of limitation applies, the length of the statute of limitation is set according to the maximum sentence (Sect. 57 para. 3 CC). It is:

- 20 years — for offences punishable by more than 10 years of imprisonment but that are not punishable by imprisonment for life;
- 10 years — for offences punishable by imprisonment for more than five years and a maximum of 10 years;
- five years — for offences punishable by imprisonment for more than one year and a maximum of five years;
- three years — for offences punishable by imprisonment for more than six months and a maximum of one year;

- one year — for offences punishable by imprisonment for a period not exceeding six months or by a fine.

29. Hence, in light of this classification in particular and the system of the Criminal Code and criminal procedure in Austria in general, the 10-year-term of limitation for enforced disappearance of a person under section 312b CC is of long duration and is proportionate to the extreme seriousness of this offence.

With reference to section 64 (4c) (b) of the Criminal Code, please specify which other interests would trigger the State party to provide for jurisdiction in cases of enforced disappearance. With reference to paragraph 64 of the report, please provide detailed information on the mechanisms for implementing article 10 (2) of the Convention, in relation to notifying the States parties referred to in article 9 (1) when a person of their nationality has been detained, including the circumstances warranting detention, the findings of a preliminary inquiry or investigation, and whether the State party intends to exercise its jurisdiction in appropriate cases. Please clarify whether the reciprocity requirement in the law on mutual assistance could prevent the State party from fully implementing article 10 of the Convention (arts. 9 and 10).

30. In case a person suspected to have committed an offence under the Convention is detained on Austrian territory, the competent Austrian public prosecution service has to examine whether there are grounds for extraditing the person to the State where the alleged offence has been committed, including his or her State of nationality. Should there be such grounds, the public prosecution service, following the interrogation of the person, has to inform the Austrian Federal Ministry of Justice accordingly. The Ministry will then inform the State in question of the circumstances, asking whether extradition of the person will be requested (in detail, see Section 28 para. 1 of the Austrian Extradition and Mutual Legal Assistance Act (ARHG)). In case of inadmissibility of extradition, there will be Austrian jurisdiction in accordance with the principle „aut dedere aut judicare" under the conditions set forth in Sect. 65 para. 1 subpara. 2 CC.

31. The reciprocity requirement in the Austrian law on mutual legal assistance does not hinder the full implementation of Art. 10 of the Convention.

32. The term "other Austrian interests" according to Sect. 64 para. 1 subpara. 4c (b) CC refers to any other connection with Austria. This could be, e.g., if the crime is committed abroad and the perpetrator acts with the consent of an Austrian official (who has not contributed to the offense) or if the (non-Austrian) victim is supposed to be enforcedly brought to Austria.

Please indicate whether, pursuant to national law, military authorities are competent to investigate and prosecute persons accused of enforced disappearance (art. 11).

33. No, the offence of enforced disappearance has to be investigated and prosecuted ex officio by the competent authorities (criminal investigation department, public prosecutor) pursuant to the Code of Criminal Procedure (CCP).

In relation to paragraphs 31 and 72 of the report, please provide additional information on all the measures in place to ensure prompt, effective and impartial investigation of alleged cases of enforced disappearances (art. 12).

34. In the framework of their tasks criminal police and office of public prosecution are obliged to clarify any initial suspicion of a criminal act they obtain knowledge of in investigation proceedings ex officio unless such act is only to be prosecuted on application of the person entitled to do so. In the main proceedings the court ex officio has to clarify the acts on which the accusation is based on as well as the fault of the accused (principle of ex officio; Sect. 2 CCP).

35. According to Sect. 3 CCP, the criminal investigation department, public prosecutor and court are obliged to investigate the truth and clarify all facts that are important for the assessment of the offense and the accused. All judges, prosecutors and criminal police bodies have to exercise their duties impartially and avoid any appearance of bias.

36. Sect. 47 CCP deals with the impartiality of the criminal investigation department and the public prosecutor's office in more detail. It reads as follows:

"(1) Every member of the criminal investigation department and the public prosecutor office has to abstain from performing his/her duties and arrange for/his substitution:

1. in proceedings in which he/she or one of its relatives (Art. 72 Criminal Code) is involved as a defendant, private prosecutor, private party or as their representative in the proceedings, or was or could have been harmed by the offense; the qualification as relative provoked by marriage remains also if the marriage no longer exists;

2. members of the criminal investigation department in proceedings in which he/she was a judge or a prosecutor, members of the public prosecutor office in proceedings in which he/she was a judge or member of the criminal investigation department;

3. if there are other reasons which qualify for doubting his/her full impartiality.

(2) In case of imminent danger, the prejudiced member may conduct urgent duties if the representation by another person cannot be effected immediately, in so far as he/she would not have to take action against him-/herself or against a relative;

(3) The head of the authority to which the member belongs has to decide on the question of the bias; in the case of bias of the head of the authority, the head of the superior authority has to decide in the course of the supervision and take the necessary measures".

37. Sect. 78 CCP determines a general reporting obligation for authorities or public offices. If they become aware of the suspicion of a crime, which concerns their statutory area of activities, they are obliged to report it to the criminal investigation department or to a public prosecutor service.

38. Pursuant to Sect. 9 para. 1 CCP, the investigation of alleged cases always has to be conducted prompt and without undue delay.

39. According to Sect. 108a CCP which entered into force on 1 January 2015, the duration of the investigation procedure (counting from the first investigation against an accused person which suspends the statute of limitations) must not exceed a period of three years. If the investigation procedure cannot be completed within this time, the Public Prosecutor has an ex officio obligation to report to the competent court on the reasons for the delay. If there are no legal grounds for closing the proceedings, the court will extend the statute of limitations for two more years and – considering all the aspects of the case – rule on whether the Public Prosecutor is responsible for the delay. If the investigation procedure is not completed within the following two-year period, the Public Prosecutor is obliged to inform the court accordingly and the court will once again proceed as mentioned above.

Please indicate whether, in addition to the protection of witnesses referred to in paragraph 70 of the report, mechanisms exist for the protection of complainants, the relatives of disappeared persons, their defence counsel and other persons participating in the investigation of a case of enforced disappearance against any kind of ill-treatment or intimidation. Please also indicate whether (a) during an investigation into a reported case of enforced disappearance, national law provides for the immediate suspension from duties of an alleged offender if he or she is a State agent and (b) there are any procedural mechanisms to exclude any civil or military law enforcement or security force from investigating an allegation of enforced disappearance in the event that one or more of its members are suspected of having committed the crime. If so, please include information about the implementation in practice of the relevant provisions (arts. 12).

40. The protection of witnesses was developed as a regular police function deriving directly from the responsibility of the police to protect the life and safety of people. Therefore, the protection of witnesses is seen as a particular law enforcement task; laid down in Sect. 21 and 22 para. 1 subpara. 5 "Sicherheitspolizeigesetz (SPG)" [Code of Police Practice]. Hence, authorities have to provide protection to individuals who can

provide information on a dangerous assault or organised crime and who are therefore in particular danger, as well as potentially endangered relatives of such persons (Sect. 22, para.1, sub-para.5 Code of Police Practice). The most intensive protection measures provided are witness protection programmes.

41. Apart from that, authorities have to provide additional measures such as regular patrolling around the witness's house, change of residence, provision of emergency contacts, provision of electronic devices, and temporary close protection, which are not restricted to witnesses.

42. According to Sect. 162 CCP, in case of serious danger to life, health, physical integrity or liberty of the witness or a third party by the disclosure of the witness' name and other personal information or by answering questions that allow conclusions on his/her identity, the witness can be permitted to refrain from answering such questions (anonymous testimony). Under such circumstances, the witness may also change his/her appearance in such a way that he/she cannot be recognized:

(a) According to Sect. 76 para. 5 CCP the administrative authority ("Dienstbehörde") has to be informed of the beginning and end of criminal proceedings against public officials,

(b) The authorities competent to investigate the offence of enforced disappearance (just as any other offense of the CC) are the criminal investigation department, the public prosecutor and, under certain circumstances, the criminal court, and thus not civil or military law enforcement or security force.

43. The impartiality of the judge is provided for in Sects. 43-46 CCP, the impartiality of the criminal investigation department and the public prosecutor's office in Sect. 47 CCP (see answer to list of issue no. 11).

Please indicate whether any limitations or conditions in national law could be applied in relation to requests for judicial assistance or cooperation in the terms set out in articles 14 and 15 of the Convention (arts. 14 and 15).

44. Under the Austrian Extradition and Mutual Legal Assistance Act, mutual legal assistance cannot be granted in the cases set forth in Section 51 para. 1 of that Act (see the attached translation of the ARHG into the English language, attachment 1).

IV. Measures to prevent enforced disappearances (arts. 16–23)

With reference to the amendment to the Asylum Act passed in 2015 granting the Government of the State party the power to declare a state of emergency in the event of a mass influx of asylum seekers, please (a) provide information about the mechanisms and criteria applied in the context of procedures concerning expulsion, return, surrender or extradition to evaluate and verify the risk that a person may be subjected to enforced disappearance, especially at the border where police officials determine admissibility, (b) indicate whether it is possible to appeal a decision on expulsion, return, surrender or extradition and, if so, please indicate before which authorities, what the applicable procedures are, and whether they have suspensive effect, and (c) state whether the procedure, including the fast-track admissibility procedure under the recent amendment to the Asylum Act, provides the necessary guarantees to ensure strict compliance with the principle of non-refoulement under article 16 (1) of the Convention. Please specify what training is provided to border police on their responsibilities under the fast-track admissibility procedure (art. 16).

45. The standard asylum procedure is carried out by the Federal Office for Immigration and Asylum, which decides after a personal interview within six months after the application was lodged. An asylum procedure will be conducted upon the application of the person concerned, even after irregular entry into Austria. Also no time limits apply as to when the application for international protection has to be submitted. During the procedure the applicant is entitled to basic care covering basic needs such as shelter, food, health care on the level provided to Austrian citizens as well as schooling for children.

46. Against a decision by the Federal Office for Immigration and Asylum the applicant can lodge an appeal within four weeks to the Federal Administrative Court. This appeal has suspensive effect (exceptions apply e.g. in case of Dublin transfers and manifestly ill-founded applications). This Court conducts a personal hearing and has to decide within twelve months after lodging the appeal. Against a negative decision of the Federal Administrative Court, the applicant has the possibility to appeal before the Supreme Administrative Court or the Constitutional Court.

47. The Austrian migration law emphasis that the guarantees of Art. 2, 3 and 8 of the European Convention on Human Rights (ECHR) have to be respected in every step of the asylum and return procedure. If life and/or humane treatment of applicants are in danger, return decisions cannot be effected.

48. In 2016, the Austrian Parliament authorized the Federal Government together with the standing committee of the first chamber of the Austrian Parliament to enact a regulation declaring a threat to public order and national security, in which case special procedures are to be applied to persons seeking to enter Austria for international protection.

49. In order to enact this regulation the Federal Government would have to state in writing the grounds based on which a threat to public order and national security exists, making reference to the number of persons seeking international protection and the systems of the state, whose functioning is threatened by the current migration situation. Then the standing committee of the first chamber of the Austrian Parliament would have to agree with the Federal Governments assessment before the regulation could be applied.

50. There has never been such a regulation in practice.

51. Even if the regulation was ever passed, the guarantees of the European Convention on Human Rights remain part of Austrian's constitutional law. In order to guarantee the rights according to Art. 2 (right to life), 3 (prohibition of torture) and 8 (right to respect for private and family life) of the Convention the following procedure is foreseen: If a person, who is not allowed to enter Austria, asks for international protection in person at the border check, the police has to check on an individual basis, whether a refusal of entry into Austria is possible. A person, who has entered Austria on an illegal basis, has to ask for international protection at a so-called registration centre. If he/she requests international protect elsewhere the police has to bring him/her to this registration centre. At the border check as well as the registration centre the police have to conduct an interview to learn about the circumstances of the person and make an individual assessment, if in denying entry into Austria and/or "returning" him/her to a neighbouring country of Austria his/her rights according to Art 2, 3 or 8 of the Convention would be violated. The best interest of the child has to be taken into account also. If a violation were to occur, the person is allowed to enter Austria and start a regular asylum procedure. Otherwise the person is not allowed to enter Austria and has to be returned to the country from which he/she just attempted to enter Austria, where an asylum procedure must be carried out by that state as all neighbouring States are bound by the Convention, as well as the Geneva Convention on the Status of Refugees and relevant UN conventions on human rights.

52. The denial of entry at the border can be appealed before the competent regional administrative court. This appeal must be lodged within six weeks and has only suspensive effect when granted by the regional administrative court (after weighing of interests). The regional administrative court has to decide on the appeal within six months. If the administrative court decides that the denial of entry was unlawful, the application of asylum will be examined by the Federal Office for Immigration and Asylum in a standard procedure.

Please indicate whether there are any States that are considered safe in relation to procedures in cases of expulsion, return, surrender or extradition of persons. If so, please indicate on the basis of which criteria a State is considered safe, how often these criteria are reviewed and whether, before proceeding to the expulsion, return, surrender or extradition of a person to a State considered safe, a thorough individual assessment is made of whether the person concerned is at risk of being subjected to enforced disappearance (art. 16).

53. Austrian law stipulates that EU member states as well as Australia, Iceland, Canada, Liechtenstein, New Zealand, Norway and Switzerland are safe countries of origin in an asylum procedure.

54. The Federal Government is authorized by law to list further countries of origin as safe where there is a general lack of persecution by the state, effective protection from persecution by private individuals and effective legal remedies against violations of Human Rights. According to a regulation on this basis Bosnia and Herzegovina, Kosovo, Mongolia, FYR of Macedonia, Montenegro, Serbia, Albania, Ghana, Morocco, Algeria, Tunisia and Georgia are also considered safe countries of origin.

55. When a person from a country of origin that is considered safe asks for asylum there must nevertheless be a regular asylum procedure (as described in answer to question 14). The Federal Office for Immigration and Asylum is authorized to deny suspensive effect of an appeal in the asylum procedure to persons coming from a safe country of origin. However the return may not be carried out until the Federal Administrative Court has had a chance to review the case (within one week).

56. In any case, prior to the implementation of a return order, each case is again individually assessed and will not be carried out if a violation of Art. 2, 3 and 8 ECHR were to occur. This examination is in line with Art. 16 of the International Convention for the Protection of All Persons from Enforced Disappearance (violation of human rights or international humanitarian law).

With reference to paragraph 89 of the report, please confirm whether all persons taken into custody have access to legal counsel, including free legal aid in case of need, from the very outset of deprivation of liberty (art. 17).

57. All persons who are arrested or detained are informed about the rights to which they are entitled immediately after their arrest. To this end an information leaflet for persons who were arrested are handed out. It is currently available in 43 different language (attached please find the German and English language versions, attachment 2 to 9). These leaflets also contain information on the right to legal assistance. These leaflets are always available for download for police. The police officers are obliged to give out the relevant leaflet and document this fact in the arrest report.

58. If an accused, who does not yet have a defence counsel, is arrested or summoned to immediate examination, he/she has to be given the opportunity to contact a defence counsel and to grant him/her powers of attorney. If in such cases the accused does not appoint a self-chosen defence counsel, until the decision on arrest he/she may contact a "defence counsel in on-call service". Their accessibility is ensured at all times on a 24/7 basis (Tel: 0800 376 386). The contact between accused and his defence counsel may not be monitored (Sect. 59 CCP).

59. According to Sect. 61 para. 1 subpara. 1 CCP, an accused must be represented by a defence counsel (compulsory representation by a defence counsel) throughout the proceedings, if and as long as the accused is detained in pre-trial detention or in custodial detention according to Sect. 173 para. 4 CCP. If the accused is not in a position to bear the entire costs of a defence counsel without affecting the subsistence necessary for a plain lifestyle for himself and his/her family in the cases of compulsory representation, the court shall decide, upon an application by the accused, to assign a defence counsel to the defendant, whose costs he/she will not have to bear or bear only in part (legal-aid defence counsel, Sect. 61 para. 2 subpara. 1 CCP). If the accused does not file such an application, according to Sect. 31 para. 3 CCP the court ex officio has to appoint a defence council, whose costs the accused has to bear if the above mentioned conditions do not apply ("Amtsverteidiger").

60. Visits by legal representatives of persons detained by the police are regulated in Art. 21 para. 3 of the "Anhalteordnung" [Ordinance of the Federal Minister of the Interior on the detention of people by the security authorities and organs of the public security service, short: Detention Regulation]. Visits by legal representatives are allowed at any time without limitations as to their number. For persons in detention pending return a legal representative is provided in any case. The council is carried out by NGOs under contract with the state.

In connection with paragraphs 92 and 93 of the report, please indicate whether the electronically managed Integrated Administration of the Penitentiary System and the police database for persons in detention contain all the information mentioned in article 17 (3) of the Convention, and how often they are updated with new information. In addition, please indicate whether there have been any complaints concerning delays or failure by officials to record a deprivation of liberty or any other pertinent information in registers concerning persons deprived of their liberty and, if so, please provide information on the proceedings initiated and, if relevant, the sanctions imposed and the measures taken to ensure that such omissions are not repeated (arts. 17 and 22).

61. All the relevant information concerning an inmate of a prison is stored within the electronically managed Integrated Administration of the Penitentiary System (IVV). This database works on real-time basis, so that all information that is fed into this database can be accessed within seconds from all users of this system who are entitled to access it. All employees of the prisons are instructed to enter every change of the key information concerning an inmate as soon as possible. Since 2000 which was when the Austrian Prison Administration started applying this electronic information system up to now, only a couple of complaints have been raised concerning delays or failure by officials to record a deprivation of liberty or any other pertinent information in registers concerning persons deprived of liberty. According to Sect. 303 CC, any person being a government official who grossly negligently (Sect. 6 para. 3 CC) violates the rights of another by unlawfully infringing upon or depriving of personal liberty is liable to imprisonment for up to three months or a fine not exceeding 180 penalty units.

62. All the data foreseen in Art. 17 para. 3 of the Convention are stored in the police database for the administration of detention (Anhaltedatei Vollzugsverwaltung, in short the AD-VW). Like the IVV this system works on a real time basis. With regard to "Elements relating to the state of health of the person deprived of liberty" (Art. 17 para. 3 lit f CED) the AD-VW contains data about medical checkups (when and who) and whether or not the person is medically fit for detention. Information about medical records necessary for curative treatment (the outcome of checkups, the health status, diagnosis and treatment prescribed) are kept separately for data protection reasons (upon recommendation from the Austrian National Prevention Mechanism). In the police detention centers in Vienna, for example, this strictly medical data are entered in a medical data application "InnoMed", to which only medical personnel have access.

63. All the data contained in the AD-VW is updated when necessary. Measures in relation to the detainee, transfer within the detention center or to another center, complaints of the prisoner and the investigations, medical checkups, visits from family/friends/lawyers etc., hunger strike etc. are all kept on file and updated. The legal basis for the record keeping and documentation are Art. 28 "Anhalteordnung" (Detention Regulation) and Art. 10 "Richtlinienverordnung" (Regulation on Police Duties).

64. Concerning possible complaints about delays or omissions in the documentation: In addition to the operational control and instructional powers within the scope of the Civil Service Act (Beamtendienstgesetz, BDG) which applies to all police officers and civil servants, the tasks of the Commissions of the Austrian Ombudsman Board (AOB) as provided for in the Federal Constitution and the Act on the Austrian Ombudsman Board are to be pointed out. Sect. 11 of the Act on the Austrian Ombudsman Board is the relevant provision which includes all control and audit powers and tasks of the Commissions of the AOB, which also fulfills the function of the national prevention mechanism against torture. Where such visits by the Commission show any deficiencies, they will be examined in the form of test procedures pursuant to Arts. 148a para. 2 or 148a para. 3 item 1 of the Federal Constitution.

Please indicate whether in the national law applicable to detention of suspected terrorists, and in practice, the guarantees provided for in articles 17 (2) and 18 of the Convention are respected (arts. 17 and 18).

65. All suspects in detention, regardless of the crime, enjoy the same rights and the guarantees provided in Art. 17 (2) by law and in practice, cf. in particular Sects. 170-189 CCP and Penal Service Act (StVG).

66. Certain restrictions of the rights may be made if provided so by the law and with respect to the principle of proportionality: e.g. according to Sect. 185 para. 2 CCP, to the extent necessary to achieve the purposes of pre-trial detention, detainees who are suspected to be involved in the same criminal offense must be arrested in such a way that they cannot communicate with each other. Pursuant to Sect. 188 para. 1 CCP, the conversion between the detained accused and a visitor may be observed as far as this is ordered so by the Office of the Prosecutor Office in order to safeguard the purpose of the pre-trial detention or the Head of the prison in order to maintain security in the institution (subpara. 2). Furthermore, the visit of certain persons may be prohibited if they are likely to jeopardize the purpose of pre-trial detention or the security within prison (subpara. 3).

67. Regarding a breach of the fundamental right to personal liberty, the concerned person can file a complaint to the Supreme Court according to the Act on Fundamental Rights Complaint (Grundrechtsbeschwerdegesetz, GRBG) after exhaustion of remedies.

Please indicate whether the Ombudsman Board possesses sufficient financial, human and technical resources to enable it to carry out its functions, including as the national preventive mechanism, effectively and independently. Please provide information on any change to the budget allocated to the Ombudsman Board during the reporting period and, if so, indicate which of its functions have been affected (art. 17).

68. In the reporting period the budget of the Austrian Ombudsman Board (AOB) has remained largely the same. The AOB thus possesses sufficient financial, human and technical resources to enable it to carry out its functions, including that as NPM, effectively and independently.

69. However, to keep this sound financial situation it has to be noted that in the past years reserves of the AOB had to be released. Therefore, a moderate increase in the financial and human resources would be advisable in the medium term.

With reference to paragraph 104 of the report, please clarify what information persons with a legitimate legal interest — who, however, are not legal representatives of disappeared persons — can obtain at the public prosecutor's office or at the court (art. 18).

70. According to Sect. 77 para. 1 CCP, the Office of the Prosecution or the court have to grant persons with a legitimate legal interest the right to access the records of the investigation and trial proceedings, insofar as this does not conflict with overwhelming public or private interests. The information encompasses all the information contained in the files, including legally binding (completed) files.

Please indicate whether the State party provides, or envisages providing, specific training on the Convention, in the terms set forth in article 23 thereof, to civil or military law enforcement personnel, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty as well as judges and prosecutors. In doing so, please also indicate the nature and frequency of the training provided and the authorities in charge of facilitating such training (art. 23).

71. In accordance with Sect. 11 of the Security Police Act (SPG) the "Sicherheitsakademie" (Police Academy) of the Federal Ministry of the Interior is the main institution for police training, both at the basic and the advanced level. Following the training architecture, students are acquainted with human rights issues and specifically with police interventions in the sphere of the basic right of freedom — both from the legal as well as the ethical aspect — from the beginning of their studies onwards; thus their knowledge is deepened and permanently brought up-to-date during the entire path of their career. Furthermore, their expertise is even more enhanced by specific training modules provided under the umbrella of the enhanced training programme and the various curricula that come with it. Within this scope, the Police Academy provides several trainings dealing with issues of persons falling under the Convention, such as the correct application of the CCP, the Aliens Police Act or topics related to persons with mental disorder.

72. In addition to the legal content and personality-forming seminars such as the training "A world of difference" where police officers learn about different types of discrimination and become more professional through the reflection of their attitudes, the so-called

"modular competence training", which was introduced in 2016 in all training centres of the Police Academy, is a central focus of the police basic training. This training is completed on a monthly basis in addition to the respective theoretical inputs and includes a holistic training approach.

73. It consists in the regular practice of police officers, including the subsequent reflection and legal processing of the intervention. The legal assessment ranges from the simple law that required the intervention, through the constitutional right up to the human rights to be protected behind it. For the next training unit on the result of the assessment of the intervention and its legal basis, learning objectives are agreed upon between the coaches and the participants and the further development of the participants is documented.

74. The search of missing person is included in the police training at all training levels.

75. Mandatory training modules in the area of fundamental and human rights are envisaged also for future judges, public prosecutors and for prison staff; however at present no special training programmes regarding "enforced disappearance" are offered.

V. Measures to provide reparation and to protect children against enforced disappearance (arts. 24 and 25)

With reference to paragraphs 129 and 130 of the State party's report, please explain how the definition of victim in national law would satisfy the wider definition of victim, as any individual who has suffered harm as the direct result of an enforced disappearance, in accordance with article 24 (1) of the Convention (art. 24).

76. According to Sec 65 subpar. 1 of the CCP the "victim" is:

(a) Each person, who could have been exposed to violence or dangerous threat or whose sexual integrity could have been compromised through an intentional criminal offence or whose personal dependence was exploited by such a criminal offence;

(b) The spouse, life companion, relative in a direct line, brother or sister and other dependents of a person, whose death could have been caused by a criminal offence, or other relatives, who were witnesses of the criminal offence;

(c) Any other person, who could have suffered damage caused by a criminal offence or who could have otherwise been affected with respect to his/her interests protected by criminal legislation.

77. Thus, this definition is in line with Art. 24 (1) of the Convention.

Please indicate whether, in addition to compensation and a guarantee of non-repetition referred to in paragraphs 132, 133 and 134 of the report, national law provides for other forms of reparation in accordance with article 24 (5) of the Convention and whether there is a time limit for the provision of reparations to victims of enforced disappearance. Please provide information on the criteria used to determine whether dependent relatives suffer any harm and are thus eligible for compensation, in relation to the criteria used to recognize a person as a victim under section 65 (1) (a) and (c) of the Code of Criminal Procedure. In relation to paragraph 136 of the report, please provide the content of, and an update on, the draft bill to improve victims' rights (art. 24).

78. According to Sect. 67 CCP a victim (cf. definition in Sect. para. 1 65 CCP) may become a private participant ("Privatbeteiligter") to the criminal proceeding by declaring to request compensation for the suffered damage or the infringement of the rights. The declaration can be filed at the police or at the prosecution service during the preliminary investigation procedure or at court after the indictment. The private participant has to specify the amount claimed.

79. The 17th part of the CCP stipulates the procedure regarding civil claims within the criminal proceeding (Sects. 366-373b CCP). In case of an acquittal, the private participant is referred to claim his or her compensation before the civil courts. If the defendant is convicted, the (criminal) court has to decide on the claims of the private participant (Sect.

366 para. 2 CCP). If the (criminal) court is not in the position to decide on the claim, the private participant may be referred to civil proceedings, unless the evidence can be taken (within the criminal proceedings) without significant delay. The private participant has the right to appeal against the court decision if he or she is referred to civil proceedings (Sect. 366 para. CCP). The court decision on the claims of the private participant is enforceable under the rules of the Austrian Enforcement Act.

80. According to Sect. 67 para. 1 CCP, in the case that an expert is appointed to examine the extent of injury or health damage, the expert also has to determine the pain periods. Thus, this provision facilitates the assessment of injuries caused by the criminal act and hence the compensation.

81. The main amendments of the Code of Criminal Proceedings Amendment Act No I 2016 (Federal Law Gazette I No 26/2016), which entered into force on 1 June 2016, include:

- Victims whose personal dependence was exploited by an intentional criminal offence are included in the definition of victims according to Sect. 65 subpara. 1 cif a CCP. The new category includes cases in which the accused person is a parent/near relative of the victim. As consequence of the inclusion in Sect. 65 subpara. 1 c CCP, such victims have the right to assistance in court proceedings according to Sect. 66 para. 2 CCP;
- Incorporation of the categorization of particularly vulnerable victims and definition of their special rights (Sect. 66a CCP);
- Incorporation of an obligation of the public prosecution service or the criminal court to initiate the appointment of a curator (= special representative) for the minor victim if a legal representative of the minor victim is suspected of having committed the criminal offence or if otherwise there is the risk of a conflict of interests between the minor victim and his/her legal representative, or if no legal representative can assist the minor victim in criminal proceedings (Sect. 66a para. 3 CCP);
- Extension of the right to translation services of victims (Sect. 66 para. 3 CCP);
- Enhancement of the right of victims to be informed about their rights (Sect. 70 para. 1 CCP);
- Incorporation of the right of victims to be informed of the release of the accused person from custody and provisional custody during the investigation with details of the reasons and the conditions imposed as well as in the event of escape by the accused person (Sect. 172 para. 4, 177 para. 5, 181a CCP);
- Extension of the adversary questioning of minor victims and witnesses (Sect. 165 para. CCP).

Please provide more information on the applicable law in relation to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in matters such as social welfare, financial matters, family law and property rights (art. 24).

82. As a matter of principle, missing persons are considered alive — and therefore enjoy all rights of living persons — until their death has been entered into the Central Civil Registry (ZPR) or their death has been evidenced by a court or a declaration of death has been issued. The death can only be entered into the Central Civil Registry or a death certificate can only be issued, if the body of the person has been found and identified.

83. If the body of the person could not be found, but the particular circumstances of death are known, the death can be evidenced by the court. If for instance, the death can be evidenced by witness statements, the court shall determine the date of death. An application for a declaration of death can be filed by any person with a legal interest in such declaration (such as spouse or children of the missing person).

84. If the death of a person cannot be evidenced with certainty, but at the time of disappearance was verifiably in peril of death (e.g. if the missing person was staying in a disaster zone), a declaration of death may be applied for after a one-year absence without any message.

85. If the missing person at the time of disappearance verifiably was not in any peril of death (e.g. in a disaster zone) such person can only be declared dead after ten years absence without any message, and not before such person has reached 25 years of age.

86. In addition, the Austrian Civil Code (hereinafter ABGB) regulates measures to be taken for the protection of a missing person. The appropriate instrument is the representative in absentia. He/she can be appointed ex officio or upon application by the guardianship court.

87. Furthermore, if only the representation in legal proceedings is required (and no other business is pending), a representative pursuant to Sect. 116 Code of Civil Procedure (hereinafter ZPO) may be appointed.

88. Legal Basis:

(a) Sect. 270 ABGB-- valid until 30 June 2018:

> For absentees and for unknown participants in a business transaction: "A representative in absentia for absentees or participants in a business transaction yet unknown to the court shall be appointed, if such absentees or participants have not designated any proper representative, and the lack of such representatives would jeopardise their rights by default, or impede the rights of others in their process, unless such rights can be safeguarded in some other way, such as by appointing a representative in specific legal proceedings by the competent court. If the place of residence of an absentee is known, his/her representative must inform such absentee of the state of affairs and deal with such affairs like with the affairs of a minor, unless another disposition has been made";

(b) Sect. 277 (1) ABGB- valid as from 1 July 2018: Sect. 277 et seqq. ABGB in the version of the 2. Adult Protection Act:

If persons cannot deal with their affairs themselves, because

1	They have not been fathered
2	They are yet unborn
3	They are absent or
4	Their identity is unknown

If their affairs cannot be handled by any other representative, and if the interests of such a person would be jeopardised, a representative in absentia shall be appointed.

(c) Sect. 116 ZPO:

> "Service of Documents to the Representative in Absentia. For persons who could only be served documents by public announcement because their place of residence is unknown, the court shall appoint a representative in absentia (Sect. 9) either upon application or ex officio, if such persons would have to perform acts of procedure upon receipt of such service of documents in order to safeguard their rights, and in particular if the document to be served contains a summons for such persons to appear in court".

With reference to paragraph 137 of the report, please indicate whether any steps have been taken to bring national legislation into line with article 25 (1) of the Convention. Please provide information on the relevant measures taken to search for and identify child victims of enforced disappearance, including DNA databases, and the procedures in place to return them to their families of origin. Please indicate which procedures are in place to guarantee the right of disappeared children to have their true identity re-established. Please specify the content of relevant provisions referred to in paragraph 140 of the report and also provide detailed information on current legal procedures for reviewing adoption, placement and guardianship arrangements resulting from an enforced disappearance. Please provide information on the procedures and criteria developed to determine the best interests of the child, especially those related to enforced disappearance (art. 25).

89. There seems to have been a misunderstanding and/or a translation problem here. The first half sentence of its report summarizes the content of Art. 25 para. 1 of the Convention and is followed by what Austria has in place to meet the requirements of this provision. Austria considers its national legislation to be fully in line with Art. 25 para. 1 of the Convention. As outlined in the report, the relevant provisions are in particular Sects. 302, 195, 223, 224 and 229 CC.

90. The prosecution authorities shall comply with the obligation contained in Art. 25 para. 2 to search for and identify the children referred to in para. 1(a) and to return them to their families of origin. For this purpose, also international legal assistance (para. 3) may be requested.

91. In this respect, Austria is a member state of INTERPOL's worldwide network. Search data on disappeared persons and information on unknown corpses are exchanged by the Criminal Intelligence Service of Austria in its capacity as "National Central Office" of INTERPOL via a specific communication channel with 191 partner States. In the case of worldwide searches, the Federal Criminal Police Office arranges for the data to be stored in the search database of the General Secretariat of INTERPOL in Lyon where it can be retrieved from by all partner States. The same procedure is also available to the Austrian Police Offices regarding searches for foreign missing persons.

92. Austria is also a participating state in the Schengen Information System (SIS II), which offers the opportunity to search for missing persons in 30 European Schengen states. If a missing person case is reported in Austria, the personal data are stored in the national EKIS search system and automatically routed to the SIS II at the same time.

93. International cooperation with foreign security authorities and security organizations regarding the provision or claim of mutual assistance is regulated by law in the „Bundesgesetz über die internationale polizeiliche Kooperation (PolKG)" [Federal Law on International Police Cooperation] and in the „Bundesgesetz über die polizeiliche Kooperation mit den Mitgliedstaaten der Europäischen Union und der Agentur der Europäischen Union für die Zusammenarbeit auf dem Gebiet der Strafverfolgung (Europol), (Eu-PolKG)" [Federal Law on Police Cooperation with the Member States of the European Union and the European Agency Union for Law Enforcement Cooperation (Europol), (Eu-PolKG). These regulations include the missing person search.

94. The option pursuant to Art. 25 para. 4 to review, and where appropriate, to annul adoptions, is guaranteed by Sect. 201 Austrian Civil Code and Sects. 91a et seq. Non-Contentious Proceedings Act (hereinafter AußStrG), FLG I No. 111/2003 as amended by FLG I No. 111/2010. The inclusion of the child in the proceedings foreseen in paragraph 5 is guaranteed by Sect. 90 (1) (1) and Sect. 91b (3) AußStrG.